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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1934.

No. 888 29

RICHEY V. GRAHAM,

Petitioner,

vs.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

MAY IT PLEASE THE COURT:

The statement of the case by petitioner, supplemented by the statement made by the Circuit Court of Appeals (Record pp. 144-146) seems to respondent sufficient.

SUMMARY OF ARGUMENT.

I.

Under the law merchant, as administered by the Federal Courts, a party who takes negotiable paper, before due, for a valuable consideration without knowledge of any defect of title and in good faith takes good title. The title can be defeated only by bad faith.

II.

It is present actual knowledge of a defect in the title of the transferor, not past constructive notice of some such defect, which will render the act of the transferee in taking the paper bad faith to the extent of impairing his title.

III.

The original owner of stolen bonds, by circularizing dealers in negotiable securities of the fact of the theft, cannot impose an obligation upon such dealers to read, keep in mind or preserve or search his records for such notices previous to buying bonds offered.

IV.

Circularization of stolen paper, though it appears that circulars were received, but discarded, forgotten, overlooked or negligently handled by a dealer in securities, does not impair the title unless knowledge is shown to have been present to the mind of the purchaser at the time of the purchase.

V.

The Uniform Negotiable Instrument Act as adopted in Illinois, (Petition for Certiorari p. 20), is merely declaratory of the law merchant, in the absence of a contrary construction by the highest court of Illinois.

VI.

The highest court of Illinois is the Supreme Court. The Appellate courts are inferior, intermediate courts.

VII.

The decision of the Appellate Court, First District, Second Division, State of Illinois, in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, is not by the highest court of the state, and will not be followed in the Federal Courts.

VIII.

The denial of certiorari by the Supreme Court, does not have the effect of a decision of the highest court, construing the Uniform Negotiable Instrument Act as petitioner claims it was construed in the Appellate Court in the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank* (*supra*).

ARGUMENT.

I.

At the common law, in administration of the law merchant, both in Great Britain and in the Federal Courts, one who took negotiable paper, before due, for a valuable consideration without present actual *knowledge* of any defect in the title of the transferor, and in good faith, took a title good against all the world.

There can be little doubt, after a study of Federal as well as State decisions, that the doctrine approved and applied by the Supreme Court of the United States in 1864, in the case of *Murray* v. *Lardner*, 2 Wall. 110 at 121, settled the Federal law upon the lines laid down in 1842 in *Swift* v. *Tyson*, 16 Pet. 1, and expanded in 1857 in *Goodman* v. *Simonds*, 20 How. 343, and was the general law merchant.

That rule was thus summarized in *Murray* v. *Lardner*, 2 Wall. 110, at page 121.

> "The possession of such paper carries the title with it to the holder:—'The possession and title are one and inseparable'.
>
> The party who takes it before due for a valuable consideration, without *knowledge* of any defect of title, and in good faith, holds it by a title valid against all the world.
>
> Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not

defeat his title. *That result can be produced only by bad faith on his part.*

The burden of proof lies on the person who assails the right claimed by the party in possession.

Such is the settled law of this court, and we feel no disposition to depart from it".

In *Goodman* v. *Simonds*, 20 How. at 365, it is said:—

"If a bill of exchange, endorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no *knowledge* of these facts, for a valuable consideration in the usual course of business, his title would be good, and he would be entitled to recover the amount. • • • The word *notice*, as used by this Court, on the occasion referred to, we think must be understood in the same sense as *knowledge*, and indeed that is one of its usual and appropriate significations. • • •". (p. 366).

The "bad faith" referred to in the above excerpt from *Murray* v. *Lardner*, is that state of mind and conduct which implicitly convicts of guilty knowledge, or wilful ignorance.

Hotchkiss v. *Nat. Banks*, 21 Wall. 354 at 359, where it is said:—

"A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, *or even gross negligence* at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title".

II, III and IV.

To convict of bad faith, it is not enough that it appear that at some former time, antedating the transfer, the transferee had had conveyed to him information that the particular paper had been stolen,—it must appear, in order that *guilty* knowledge be shown, that there was a conscious, present knowledge.

This principle has been adhered to by the British courts, this court and the courts of a large number of the states.

Raphael v. *Bank of England*, (1855), 17 C. B. 161; 139 English Reprint 1030.

In that case Bank of England notes had been stolen and were taken by a broker. The holding was that notice received at some previous time by the transferee, but overlooked or forgotten at the time of transfer, did not convict of bad faith.

In *London Joint Stock Bank* v. *Simmons* (1892), App. Cas. at 219, Lord Herschell approves the opinion of Willes, J., in the *Raphael* case, and at page 221 says:

> "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments".

Lord Field, in the same case, cites the *Raphael* case with approval, and says (page 227):

> "In one of those cases, *Raphael* v. *Bank of England*, the plaintiff had, at some earlier period, received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover".

In *Venables* v. *Baring Bros & Co.*, (1892) 3 Ch. Div. 527, Lord Kekewich, said at page 542:

> "Now I come to the question of negligence, I was referred to the case of *Raphael* v. *Bank of England*, 17 C. B. 161, which is certainly a case in point; because there there was a bank note—undoubtedly a negotiable instrument—and it was held that the holder might sue upon it, *notwithstanding that when he took it he had the means at his disposal which would have enabled him to detect the bad title of his transferor; but of which means he neglected to avail himself.* Negligence was there held to be no defense whatever, and I apprehend that principle is really the guide to all the decisions".

In the interim between the *Raphael* case, decided in 1855, and the *London Joint Stock Bank* case, decided in 1892, the Supreme Court of the United States in 1874, had occasion to consider the question of bona fides of a purchaser of stolen securities in *Vermilye & Co.* v. *Adams Exp. Co.*, 21 Wall. 138.

In that case the securities in question were *past due* paper, and notice of the theft had been delivered to Vermilye & Company before that company purchased the paper.

The Court held that Vermilye & Company acquired no title because the fact the paper was *past due* was enough to put them on inquiry, and obligate them to refer to their files to ascertain whether there had been any notice affecting the paper served upon them, but the Court said:

> "By the well settled law of the case they" (bankers) "may purchase such paper *before due* without cumbering their minds or their offices with memoranda of such notices".

The *Raphael* case is not referred to, but it seems clear that the Supreme Court had that case in mind as being "the well settled law of the case".

The trend of the state courts is to the same end.

Merch. Nat. Bank v. *Detroit Tr. Co.*, (1932) 258 Mich. 526; 242 N. W. 739.

Seybel v. *Nat. Cur. Bank*, 54 N. Y. 288.

Heney v. *Sutro*, (1915) 28 Cal. App. 702; 153 Pac. 972.

Gerseta Corp. v. *W. C. Silk Co.*, (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Lord v. *Wilkinson*, (N. Y.) 56 Barb. 593.

Beltzhoover v. *Blackstock*, (Pa.) 3 Watts 20.

Eng. Amer. L. & T. Co. v. *Hiers*, (Ga.) 38 S. E. 103.

Halliday v. *Elberton L. & S. Bank*, (Ga.) 128 S. E. 131.

Wildsmith v. *Tracy*, 80 Ala. 258.

Boyd v. *McCann*, 10 Md. 118.

Clark v. *Ricker*, 14 N. H. 44.

Hayden v. *Bowery Nat. Bank*, 6 Lans. 490.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 656.

Pollard v. *Tobin*, 211 Wisc. 405, followed in *Marine Nat. Exch. Bank* v. *Kalt-Zimmers Mfg. Co.*, (1934) ..... U. S. .....; 79 L. ed. 208 at 210-11.

The most recent case in a court of last resort upon the question now under consideration is *Merchants Nat. Bank* v. *Detroit Trust Company*, (Mich. 1932) 258 Mich. 526; 242 N. W. 739, and that Court considers the language of

the United States Supreme Court in the *Vermilye & Company case as stare decisis.*

The Illinois Appellate Court case (*N. W. Nat. Bank* v. *Madison & Kedzie State Bank,* 242 Ill. App. 22), is discussed by the Michigan Court and dismissed with the following comment (242 N. W. 743):

> "As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides.* It *overlooks* the well established rule" (*i. e.* the rule in the *Raphael* case, which was evidently before the United States Supreme Court in the *Vermilye & Co.* case), "that, though one has received actual notice, if, by forgetfulness or negligence, he does not have it in mind, when he acquires the bonds, he may still be a good faith purchaser".

The Court then cites and quotes from *Lord* v. *Wilkinson,* 56 Barb. (N. Y.) 593, in which it was held that an instruction "that the defendants once having had notice, are bound by it, although the notice may have been forgotten", was erroneous.

V.

The language of Section 56 of the Illinois Uniform Negotiable Instrument Act, (Appendix to petition of petitioner, page 21), is but a crystallization of the law merchant as developed in both Great Britain and the United States. It is a constant principle that when a statute incorporates language which theretofore has received a practically unanimous construction by the courts, it will be presumed that the legislators used the language with the accepted meaning.

Therefore, when the language "notice of an infirmity" and "actual knowledge" was used, it must be presumed that the words should have their defined and established meaning, and so the courts have held as to those words and other language in the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.* (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd, 74 at 85.

Gerseta Corp. v. *W.-C. Silk Co.* (C. C. A. 2nd Circ. 1924) 3 Fed. 2nd 236.

Commercial Nat. Bank v. *Canal-Louisiana B. & Tr. Co.*, 239 U. S. 520 at 528.

City of Adrian v. *Whitney Cent. & Nat. Bank* (1914) 180 Mich. 171; 146 N. W. 654.

City Bank v. *Bank of Republic*, (1921) 300 Ill. 103 at 106.

Link v. *Jackson*, (1911) 158 Mo. App. 63; 139 S. W. 588 at 593.

Unaka Nat. Bank v. *Butler*, (1904) 113 Tenn. 574; 83 S. W. 655 at 657.

Campbell v. *Fourth Nat. Bank*, (1910) 137 Ky. 555; 126 S. W. 114 at 116.

Citizens State Bank v. *Johnson Co.*, (1918) 182 Ky. 531; 207 S. W. 8 at 10.

Bank of Commerce & Sav. v. *Randell*, (1921) 107 Neb. 332; 186 N. W. 70.

Ex parte Goldberg & Lewis, 191 Ala. 356.

Piedmont, etc., R. Co. v. *Shaw*, 223 Fed. 973 at 976.

State Bank v. *Bilstad*, (1912) ..... Ia. ..... 136 N. W. 204 at 205.

Arnd v. *Aylesworth*, (1909) 145 Ia. 185; 123 N. W. 1000 at 1002.

Mass. Nat. Bank v. *Snow*, (1905) 187 Mass. 159; 72 N. E. 959.

Fillebrown v. *Hayward*, (1906) 190 Mass. 472; 77 N. E. 45.

Union Tr. Co. v. *McGinty*, (1912) 212 Mass. 205; 98 N. E. 679.

Morris v. *Muir*, (1920) 181 N. Y. Supp. 913.

Ward v. *City Tr. Co.*, 102 N. Y. Supp. 50.

Drouineau v. *Bank*, 244 Ill. App. 251.

Chi. Auto Sales Co. v. *Peters*, 221 Ill. App. 363 at 367.

VI and VII.

Under the Constitution of Illinois, the Supreme Court is the highest court of the State.

"The judicial powers, except as in this article otherwise provided, shall be vested in the Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns".

Constitution of Illinois of 1870, Art. VI, Sec. 1.

Appellate Courts.

"After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges

of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judge shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services".

Constitution of Ill. Art. VI, Sec. 11.

Appellate Courts were created by an act of the General Assembly approved June 2, 1877, one in each of four districts, and by Section 17 of the Act it was provided,

"All opinions or decisions of said court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein, the reasons for such opinion or decision, and be filed in the cause in which rendered: *provided*, that such opinion shall not be of binding authority in any cause or proceeding, other than that in which they may be filed".

Cahill's Ill. Rev. Stat. 1933, Chap. 37, Par. 49, page 918.

Branch Appellate Courts were subsequently authorized, with the same process, pleadings, practice, procedure and powers as the original appellate courts.

Cahill Rev. Stat. 1933, Chap. 37, Pars. 52-64, pp. 918-920.

It was one of these branch courts, known as the Second Division of the First District which decided the case of *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, and another, known as the First Division of the First District which, in 1934, held *contra* to that case in *Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405.

It was of an opinion of the Appellate Court of the Second District that *Lindley*, Dist. Judge, said in *Hall* v. *Mais*, 34 Fed. 2nd 528 at 530:

> "Furthermore, if there be anything in that case at variance with the court's conclusions here, it should be borne in mind that by the statutes of the State of Illinois (Cahill's Rev. St. 1929, c. 37, par. 49) the decisions of the Appellate Court are, by legislative enactment, forbidden to be accepted as binding precedents, and therefore cannot be accepted by the Federal court as determinative of the law of the State."

See also

Corpus Christi Gas Co. v. *Corpus Christi*, (Dist. Court So. Dist. Tex. 1930) 36 Fed. 2nd 972 at 973.

Wright v. *N. Y. Underwriters Ins. Co.*, 1 Fed. Supp. 663.

VIII.

The major contention of petitioner, however, is that this court is bound to accept as the construction placed upon the Illinois Act by the highest court of Illinois, the opinion of the Second Division of the Appellate Court of the First District of Illinois, in *Northwestern Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, which has been said to be a case which "stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526) despite the fact that the First Division of that District has subsequently held *contra* to that decision in *Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405, merely, forsooth, because the Supreme Court of Illinois denied an application for a writ of certiorari.

From this fact, petitioner concludes that the Supreme Court,

> "thereby approved the conclusion reached by the Appellate Court and the denial of the said writ was, in effect, an affirmance of the judgment of the Appellate Court".

It may be true that the latter clause of petitioner's conclusion, *i. e.*, that such denial was an affirmance of the *judgment*, but it is not true that it can be considered as an adoption of the reasoning and expressions in the opinion of the Appellate Court, or a construction of the Uniform Negotiable Instruments Act by the highest court in the state.

Under Section 121 of the Illinois Practice Act in force at the time, the denial of a certiorari renders the *judgment* of the Appellate Court final, but this enactment does not have the effect of rendering the *opinion* of the Appellate Court final or *stare decisis* in any cause other than that in which the opinion was filed (Cahill's Ill. Rev. Stat. 1933, Appendix, page LXXVI, par. 120).

Non constat but that the Supreme Court may disagree wholly with the reasoning of the Appellate Court's *opinion*, and still decline to review the *judgment*.

It must be borne in mind that the statutory certiorari was not a matter of right, even if a showing was made, but a matter of grace, resting in the uncontrolled and non-reviewable discretion of the Supreme Court. In granting a certiorari, or in denying it, the Supreme Court was governed by no rules of law, and was required to give no reason for its action.

If, upon general principles, or what are sometimes called "the fireside equities", the Supreme Court believed the *judgment* of the Appellate Court was right, it could and

as every lawyer knows, often did deny certiorari when it was manifest that the reasons given by the Appellate Court in its opinion were absolutely wrong and without legal foundation.

> "The denial of the writ of certiorari therefore, meant nothing more than that we approved the conclusion of the Appellate Court that the State's Attorney should have signed and presented the petition. *It did not mean that we approved the reasons set out in the opinion of that Court and its determination of the merits of the case, and the rights of the parties* to be affected by the information when filed. (*Soden* v. *Claney*, 269 Ill. 98.)"
>
> *People ex rel.* v. *Grant*, 283 Ill. 391 at 397.

In this last cited case when it was in the Appellate Court (*People ex rel.* v. *Grant*, 1st Dist., 208 Ill. App. 235), that Court devoted very earnest attention to the contention that a denial by the Supreme Court of a certiorari is tantamount to an expression of opinion by the Supreme Court in accordance with the views expressed in the opinion of the Appellate Court.

The contention was disapproved, the majority of the Court saying (208 Ill. App. at 239, *et seq.*):

> "On the argument it was further suggested that as an application had been made to the Supreme Court in that case for a writ of certiorari and denied, the court, by such action, passed upon the merits of the controversy, and thus declared itself to be in harmony with the conclusion reached by the Appellate Court. This contention, in our judgment, involves an entire misconception of the purpose and effect of the statutory provisions in regard to writs of certiorari. Those provisions are substantially identical with a section of the

United States statute providing for the issuance of writs of certiorari to the Circuit Court of Appeals.

* * *

"It seems a conclusive answer to the relator's contention to say that, during the 26 years that the United States certiorari act has been in force, there does not appear to be a case in which counsel have suggested that the Supreme Court, by denying the writ of certiorari, stamped the conclusions of the Court of Appeals with its approval, and impliedly made a declaration in regard to what was the law. The language of the statute does not require our Supreme Court to issue a writ of certiorari in any case, but merely provides that it shall be competent for it to do so; nor does it require the court to pass upon the merits of the controversy presented, but leaves that to the discretion of the court, to be exercised in every case. So, in the case cited here, the question considered upon the application for the writ was not necessarily the one as to the correctness of the conclusions of this court. The Supreme Court first had presented to it the question of whether there was anything in the circumstances of the case which made it expedient for it to pass upon the merits of the controversy and to declare the law. Obviously it was competent for the Supreme Court to go into the merits of the contentions made in the petition, but it was equally competent for it to say that as, under the decision of the Appellate Court, the questions involved would again be presented in a *quo warranto* proceeding in which all the parties in interest would be before the court, it would be better to pass upon them in that case, in which a binding adjudication of the rights of all the parties could be made. Any inference, therefore, as to the opinion

of the Supreme Court in regard to the correctness of the conclusion reached by the Appellate Court must necessarily rest upon speculation and conjecture. The function of finally declaring the law of the State rests with its Supreme Court, and is accomplished by means of its opinions, in which it speaks through its justices. The only safe rule would, therefore, appear to be that its conclusions in regard to the law are to be found in its reported opinions, and not deduced inferentially from its action in denying writs of certiorari.

* * *

"The effect of a denial of a writ of certiorari, though conclusive, is purely negative. By its action, the Supreme Court does not review the judgment of the Appellate Court, but declines to do so. This does not make the judgment of the Appellate Court final, but it leaves its finality undisturbed. For these reasons we are constrained to hold that the action of the Supreme Court in denying the State's Attorney's petition for a writ of certiorari in the case cited does not constitute an authoritative declaration in regard to the questions of law involved, and that so far as any action by the Supreme Court is concerned, these questions are still open. It, therefore, devolves upon us to consider the merits of the points presented."

The Supreme Court of the United States, in *Minn. St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410 at 412; 73 L. ed. 766 at 768, construes Sec. 121 of the Illinois Practice Act (the Certiorari section) with reference to the effect of a denial of certiorari, and says:

"While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it."

We submit that "conclusion" is used by the Court in the sense of "judgment", not reasoning or statutory construction.

The certiorari provisions of Section 121 of the Illinois Practice Act of 1907 are clearly modeled upon the certiorari provisions of the Federal Circuit Court of Appeals Act (Judicial Code, Sec. 347, which is the old Section 240 as amended).

There is a discretionary power in both the Federal and the Illinois Supreme Courts to bring up by certiorari for review, the judgments of the intermediate court, but it has never been considered by the Federal Courts that a denial by the United States Supreme Court of a certiorari to review a judgment of the Circuit Court of Appeals was an affirmance of the views of that Court, or an adoption or sanction of such views.

In *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251 at 258, the Court says:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ" (certiorari) "is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Again, in *U. S.* v. *Carver*, 260 U. S. 482 at 490; 67 L. ed. 463, Mr. Justice Holmes said:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case *as the bar has been told many times.* Therefore, it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer" (*i. e.*, decisions of Circuit Court of Appeals in which certiorari had been denied). *Cited in Atl. Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401 at 404.

In *Hudson v. Maryland Casualty Co.* (C. C. A., 8th Cir. 1927) 22 Fed. 2nd 791, the Circuit Court of Appeals had occasion to consider the effect of a decision of an intermediate appellate court of Missouri as to construction of a Missouri statute. In denying the contention that the Federal Courts were bound by a construction of a Missouri statute placed upon it by the intermediate appellate court (which seems to be in all respects equivalent to the Appellate Courts of Illinois), Stone, Circuit Judge, said:

> "It is true that for some purposes and in some senses these Courts of Appeals are courts of final resort. There is no *positive right* to a review of their decisions by the Supreme Court of the state. In that sense their decisions are final and in that sense the Supreme Court of the state has referred to them as courts of 'last resort'.
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> "But the rule now invoked is one of federal procedure and its meaning must be sought in its purpose. That purpose is for federal courts to apply the state statute as that statute has been authoritatively declared by the highest court of the state. Until the court of last resort, as personified by the highest state court which can speak upon the subject, has spoken, there can be no such finality of decision as required by the rule. The highest court of Missouri is the Supreme Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., art. 6 (Amendment of 1884), Sec. 6) and decisions of such Courts of Appeals have not the force of *stare decisis with the Supreme Court.*
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> "Each of these Courts of Appeals has a separate geographical jurisdiction and a decision by one such

court is binding only within its jurisdiction. Where these courts disagree, there is a divergence of authority even within the state and such differences have occurred. No one nor all of them can *finally* announce the law of the state, only the Supreme Court of the state can do that. This court has great respect for the opinions of the learned judges of these Courts of Appeals and will always give careful attention to the reasoning in their opinions; but persuasive force of reasoning and binding authority of decisions are different matters based upon different considerations. The harmony of decision desirable and sought by the federal rule of construction is harmony with the law as declared for the entire state by the highest state court which could determine the matter. In our judgment, the Courts of Appeals of the State of Missouri are not such courts".

It therefore appears certain that the mere assumption, without authority to support it, indulged in by counsel for petitioner on page 12 of the petition, that the opinion of the Appellate Court, in the *Northwestern Nat. Bank case* was binding on the District Court and the Circuit Court of Appeals cannot prevail, and the Circuit Court of Appeals was correct in holding that:

"It is, however, only the decisions of the highest courts of the states that are binding upon us. *Hudson* v. *Maryland Casualty Co.*, 22 F. (2d) 791 (C. C. A. 8).

The fact that the defeated party sought to review the decision in the *Northwestern Nat. Bank* Case, *supra*, and the Supreme Court of Illinois denied its application for a certiorari makes that decision no more authoritative. *People* v. *Grant*, 283 Ill. 391, 397, 119 N. E. 344; *Minneapolis, St. P. & S. S. M. Ry. Co.*

v. *Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766; *United States* v. *Carver*, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361. The rule announced in said *Northwestern Nat. Bank* Case, *supra*, has not been approved or passed upon, by the Illinois Supreme Court.

It becomes our duty, therefore, to examine the question in the light of all of the decisions of state and Federal courts and follow the United States Supreme Court decisions, if there are any in point; otherwise to announce that decision which in our opinion is in accord with the weight of reason and authority."

The fact that review of the decision of the intermediate court by the highest court of the state has been denied, thus making the *judgment* of the intermediate court final, does not have the effect of a decision of the highest court of the state so that the Federal Courts will follow it.

Cont. Secur. Co. v. *Interborough R. T. Co.*, (Circ. Ct. So. Dist. N. Y. 1908) 165 Fed. 945 at 959.

Federal Courts, upon all questions of commercial law, exercise their own independent judgment, regardless of state rules, interpretations and decisio

Swift v. Tyson, 16 Pat. 1 at 19.

Salem Tr. Co. v. Manuf. Fin. Corp. (1924), 264 U. S. 182 at 191, 192.

Presidio County v. Noel-Young Bond Co., 212 U. S. 58 at 73.

Sears v. *Greater N. Y. Devel. Co.*, (C. C. A. 1st Circ. 1931) 51 Fed. 2nd 46 at 49.

Independent School Dist. v. *Rew*, (C. C. A. 8th Circ.) 111 Fed. 1 at 11.

25 Corpus Juris, page 846, Section 185.

27 Ruling Case Law, page 52, Section 58.

This principal is applied to construction of the Uniform Negotiable Instruments Act.

Peterson v. *Metro. Life Ins. Co.*, (Dist. Ct. So. Dist. Ia. 1926) 19 Fed. 2nd 74 at 84.

Jockmus v. *Claussen & Knight, Inc.*, (Dist. Ct. So. Dist. Fla. 1930) 47 Fed. 2nd 766 at 767.

Cases relied upon by petitioner distinguished and criticized.

The principal reliance of petitioner in the District Court was placed upon the Illinois Appellate Court case, *N. W. Nat. Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22.

We have sufficiently pointed out in previous portions of this argument the reasons why that case will not be followed in this court.

Aside from that case, petitioner relied confidently upon *Childs* v. *Harris T. & S. Bank*, 27 Fed. (2nd) 633, decided in the Circuit Court of Appeals for the Seventh Circuit on June 27, 1928.

An analysis of that case will disclose that the opinion of *Carpenter, J.*, does not support the contention of petitioner or militate in any wise against the positions taken by respondent.

In that case, the facts were wholly diverse from the state of facts in the case now before the Court, and the crucial legal proposition in that case, upon which the decision turned, is wholly absent from the instant case.

The salient facts in the *Childs* case, divested of unimportant detail are as follows:

An employee of Childs, on September 6, 1921, stole Liberty Bonds of the par value of $25,000 from Harris without the knowledge of Childs. The next day Childs

received from Harris a notice of the theft, giving the numbers and denominations of the bonds.

The thief kept the bonds in his possession until June, 1922, and on June 10, 1922, the thief substituted for bonds *owned by Childs*, which were being shipped to New York, *the stolen* bonds, keeping the bonds which were the property of Childs.

At the time of this substitution, Childs had had repeated notices from Harris, giving the numbers and denominations of the stolen bonds.

In sending out the package of bonds to New York, a true list of numbers and denominations of the shipment of bonds which were the actual property of Childs, was included, but when the bonds got to New York, $25,000 of stolen bonds had been substituted by the thief for an equal lot of the bonds owned by Childs. Upon arrival of the shipment in New York, Childs' New York office did not check the bonds received with the enclosed list. If they had so done, the substitution of the stolen bonds, of the theft of which Childs had undisputed knowledge, would have been disclosed.

In the *Childs* case, the firm of C. F. Childs & Company did not get the bonds in the usual course of trade and did not give value for them. The Court disposes of this contention adversely to C. F. Childs & Company, and holds:

1. That there was no negotiation of the bonds to Childs.

2. That Childs gave no value for them, and

3. That if the substitution of the stolen bonds by the thief could be treated as a negotiation, Childs in taking such a position is bound by the guilty knowledge of the thief, its own agent.

There can be no question that respondent, White-Phillips Co., Inc., took the Illinois highway bonds in the usual and ordinary course of business and for value. The evidence establishes these two elements beyond peradventure, and thus the ratio *decidendi* and crucial point in the *Childs* case is wholly absent in the instant case as shown by the following excerpt from the opinion (p. 635):

> "No citation of authorities is needed on the proposition that, if Childs knew of its thief employe's part in the drama, it was bound to make full recompense to Harris. Childs' claim as holder for value under the Illinois Negotiable Instruments Law is not sound, because there was no negotiating between Childs and its thief employe, and because, if Childs chooses to treat it as a *negotiation* (*ex parte* to say the least), it must adopt the transaction *in toto*, charged with the guilty knowledge of the wrongdoer, its agent and servant".

CONCLUSION.

Manifestly, from the record, there is here presented an attempt to found a solitary exception in a single state to an universally accepted doctrine of the law of commercial paper, upon the decision of an inferior court of Illinois, concerning which the highest court of a respectable jurisdiction has said "As far as we have been able to determine, this case stands alone" (*Merch. Nat. Bank* v. *Detroit Trust Co.*, 258 Mich. 526), which decision is in conflict with a later holding of another co-ordinate branch of the same inferior court (*Nat. Bank* v. *Uptown State Bank*, 273 Ill. App. 401 at 405).

We submit that it is not upon such tenuous grounds that this court should overset a time honored, established and recognized rule of the law merchant, bottomed upon principle and essential to the free and liquid flow of negotiable paper.

Wherefore, respondent respectfully prays that the application for the writ of certiorari be denied.

All of which is respectfully submitted.

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